

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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In the Matter of )

Telecommunications Services )  
Inside Wiring )

Customer Premises Equipment )

In the Matter of )

Implementation of the Cable )  
Television Consumer Protection )  
and Competition Act of 1992 )

Cable Home Wiring )

CS Docket No. 95-184

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MM Docket No. 92-260

**COMMENTS**

**Adelphia Cable Communications**  
**The Arizona Cable Telecommunications Association**  
**Cable One, Inc.**  
**Insight Communications Company, L.P.**  
**The Pennsylvania Cable and Telecommunications**  
**Association**  
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## SUMMARY

The Commission's Further Notice proposes to adopt procedures suggested by the Independent Cable Telecommunications Association ("ICTA") in previous comments to govern the disposition of "home run" wiring in multiple dwelling unit ("MDU") buildings. In essence, the Commission proposes that, where an incumbent multichannel video programming distributor ("MVPD") no longer has a contractual or legal right to maintain its home runs in an MDU, the incumbent MVPD must either sell the home runs, remove them, or abandon without disabling them. The Commission would apply these rules both to cases where the MDU owner allows unit-by-unit competition among MVPDs, and where the owner chooses one MVPD to serve the entire building.

First, the Commission lacks jurisdiction to enact regulations pertaining to home run wiring in MDU buildings. The legislative history to the 1992 Cable Act repeatedly states that the Commission is to adopt rules regarding only wiring located inside individual dwelling units. Home run wiring is, by definition, outside individual dwelling units.

To the extent the Commission adopts rules regarding home run wiring, especially if such rules resemble ICTA's proposal, the Telecommunications Act of 1996 ("1996 Act") expresses certain overriding concerns that are applicable to this rulemaking. The Conference Report to the 1996 Act states that the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."

Accordingly, if the Commission adopts final rules along the lines of those proposed in the Further Notice, certain fundamental prerequisites must apply in order to further the goals

expressed by Congress. The Commission appears to have correctly intended that its proposed rules should only apply where the parties have otherwise failed to address the disposition of home run wiring contractually. The Commenters request that the Commission clarify that this was its intent. Likewise, the Commission should clarify that the rules apply only where the incumbent's legal or contractual rights to serve the building are completely exhausted, and that MDU owners cannot unilaterally terminate the MVPD's right to serve the building in violation of existing contracts. Additionally, the Commission should reiterate that any home run wiring rules do not apply in right of access states, since cable operators in such states have a perpetual right to serve and install their facilities. The Commission should also clarify that the deadlines set forth in the proposed rules for selling, removing or abandoning home run wires are tolled until a final determination of the incumbent MVPD's legal rights has been made.

Similarly, if the Commission adopts rules along the lines of those proposed in the Further Notice, certain refinements are necessary to ensure that fair competition and consumer choice are promoted over the interests of individual MVPDs and MDU owners. Specifically, any rules adopted by the Commission herein should not apply to building-by-building transitions. To do so would destroy, not enhance, consumer choice. Instead, the Commission should create incentives for MDU owners to allow competition among MVPDs on a unit-by-unit basis.

If the Commission applies its proposed rules to building-by-building service decisions, such rules should not apply where building owners receive consideration of any kind from MVPDs in exchange for granting access to the buildings. MVPDs often pay kickbacks or

other consideration to building owners in exchange for the exclusive right to serve the building. There is no evidence to support the Commission's conclusion that a competitive real estate market will discourage MDU owners from ignoring their residents' interests. Rather, the evidence demonstrates that landlords often respond to the direct financial benefit of a kickback rather than the intangible benefit of following residents' wishes.

Accordingly, any MDU home run disposition procedures should be limited to situations where the MDU owner has received no consideration from the incoming MVPD. This includes direct kickbacks, and also situations where MDU owners bundle video service with rent. In such situations, the MDU owner can pass on the cost of the MVPD's kickback to residents by increasing the rent. As the Further Notice recognizes, the landlords' ability to auction exclusive rights proves that they, not the incumbent MVPDs, are the true bottlenecks to MDU competition. The Commission should attempt to find the best way to implement Congress' express intent to promote facilities-based competition, and to promote the construction of multiple broadband infrastructures.

The Commission expresses a preference in the Further Notice that, where the incumbent MVPD elects to sell the home run wiring, the parties should negotiate the price of the wiring. However, the Commenters are skeptical that market forces alone are sufficient to establish reasonable prices when the FCC is creating essentially a forced sale situation. MDU owners and alternative MVPDs will have little incentive to agree on a reasonable price for purchasing the wiring, since, absent such agreement, under the current proposal, if the incumbent MVPD does not remove the wiring, it is deemed abandoned. Instead of offering the seller a fair price, the MDU owner will likely stall negotiations and/or refuse to purchase

the wiring. The incumbent MVPD's ability to remove the wiring often is an unrealistic alternative. Incumbent MVPDs are not likely to incur the time, expense, and ill will of residents by tearing out the home run wiring in MDU buildings. Moreover, any rules adopted in this proceeding should not create incentives for MVPDs to tear out home run wiring.

Accordingly, where the incumbent MVPD elects to sell the home run wiring, if a price cannot be agreed upon through negotiation, the matter should be referred to a third party, either binding arbitration or a Commission mechanism, such as alternative dispute resolution. In any case, certain concepts should apply. The Commission should not directly set a default price, which would make price negotiations unfair by establishing a price ceiling, tilting negotiations in favor of the landlord. Additionally, the establishment of a price must account for the full fair market value, not merely the material or depreciated book value, of the MDU home run wiring. Furthermore, in order to pass Constitutional muster, third party determination of fair market value of the wiring must be subject to a de novo adjudication.

Alternatively, if the owner elects to switch over its building to a new video provider, the owner should be required to elect to either purchase the home run wiring, allow it to remain in place, or assume the expense of its removal. If the parties do not agree on the terms of the sale, the alternative procedure explained above would apply. In this manner, the parties would have certainty that the wiring would be sold. Where the MDU owner or incoming MVPD has not elected to purchase the home runs, the incumbent MVPD would be entitled to protect its property rights and prohibit other parties from using the facilities.

Finally, the MDU owner could elect to allow the incumbent provider to retain its facilities on the property, with the right to exclude others from using such facilities.

The Commenters agree with the Commission that unit-by-unit disposition of home run wiring is more pro-consumer, maximizing individual resident choice, than building-by-building disposition. However, certain procedures are necessary for the unit-by-unit approach to work equitably. First, the Commenters agree that the MDU owner and/or the new MVPD could work out arrangements for an up-front lump sum payment in lieu of a unit-by-unit payment. Specifically, the MVPD competitor should pay up front 50 percent of the fair market value of all the home runs in the MDU. Second, subsequent competitors who are chosen to serve a unit would be required to reimburse existing competitors their pro rata share of the cost of the home run wiring in the building. Third, each competitor would be guaranteed a reasonable contract length, such as 15 years. Fourth, it would be improper to permit the alternative MVPD or the MDU owner to act as the subscriber's agent in providing notice of a subscriber's desire to change services. Such a practice would invite slamming, which is contrary to the stated public policy goal of promoting consumer choice.



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**COMMENTS**

Adelphia Cable Communications ("Adelphia"); the Arizona Cable Telecommunications Association ("ACTA"); Cable One, Inc. ("Cable One"); Insight Communications Company, L.P. ("Insight"); the Pennsylvania Cable and Telecommunications Association ("PCTA"); State Cable TV Corporation ("State Cable"); and Suburban Cable TV Co. Inc. ("Suburban") (collectively, the "Commenters"), by their attorneys, hereby respectfully submit these comments in response to the above-captioned Further Notice of Proposed Rulemaking released by the Federal Communications Commission ("Commission") on August 28, 1997.<sup>1</sup> The Commenters operate cable

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<sup>1</sup>Telecommunications Services Inside Wiring, Customer Premises Equipment, Further Notice of Proposed Rulemaking, CS Docket No. 95-184 (rel. August 28, 1997) ("Further Notice").

television systems in various communities across the nation or, in the case of the PCTA and ACTA, represent cable television system operators within the states of Pennsylvania and Arizona, respectively. Some of the Commenters also provide telephone and other telecommunications and information services in various communities. Accordingly, the Commenters' interests are directly affected by the proposals set forth in the Further Notice.

## I. INTRODUCTION

The Further Notice is in response to Section 624(i) of the Communications Act, which codified Section 16(d) of the Cable Television Consumer Protection and Competition Act of 1992, requiring the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber."<sup>2</sup>

At the outset, Commenters state their endorsement of the National Cable Television Association's ("NCTA") view that the Commission lacks jurisdiction to enact regulations pertaining to "home run" wiring in multiple dwelling unit ("MDU") buildings.<sup>3</sup> That issue

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<sup>2</sup>Communications Act, § 624(i), 47 U.S.C. § 544(i); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. §§ 521 et seq. (1992) ("1992 Cable Act").

<sup>3</sup>See NCTA ex parte Notice in CS Docket 95-184/MM Docket 92-260 (dated February 10, 1997) at 1, quoting the legislative history of Section 624 of the Communications Act including the adopted provisions of the House report, H.R. Rep. No. 628, 102d Cong., 2d Sess. 118 (1992), which states: "This section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit." According to the Further Notice, "home run" wiring in MDUs "runs from the point at which the wiring becomes dedicated to serving an individual subscriber to the demarcation point." Further Notice at ¶ 4. Home run wiring by definition is not "within the interior premises of a

is likely to be litigated in the courts. However, the Commenters will nonetheless address the rules as they are proposed in the Further Notice.

The House Report accompanying Section 16(d) states,

The Committee believes that subscribers who terminate cable service should have the right to acquire wiring that has been installed by the cable operator in their dwelling unit. This right would enable consumers to utilize the wiring with an alternative multichannel video delivery system and avoid any disruption the removal of such wiring may cause.<sup>4</sup>

Moreover, the Telecommunications Act of 1996 ("1996 Act")<sup>5</sup> expresses certain overriding concerns that are applicable to this rulemaking. The Conference Report to the 1996 Act states that the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."<sup>6</sup> While the Commission has correctly mentioned such goals thus far in this proceeding,<sup>7</sup> the Commenters respectfully remind the Commission of the importance of continuing to focus on these goals in adopting any rules herein.

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<sup>3</sup>(...continued)  
subscriber's dwelling unit." The Commission acknowledges this position in the Further Notice at ¶ 51, but wrongly concludes that Section 624 does not prohibit the Commission from adopting rules concerning wiring outside the subscriber's premises. Id. at ¶ 63.

<sup>4</sup>H.R. Rep. No. 628, 102d Cong., 2d Sess. 118 (1992).

<sup>5</sup>Pub. L. 104-104, 110 Stat. 56 (1996).

<sup>6</sup>H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996) ("Conference Report").

<sup>7</sup>See, e.g., Further Notice at ¶¶ 2 ("we believe that our inside wiring rules could more effectively promote competition and consumer choice"), 32, 81 ("we believe that Congress intended for Section 624(i) to promote individual subscriber choice whenever possible.")

Accordingly, if the Commission adopts final rules along the lines of those proposed in the Further Notice, certain fundamental prerequisites must apply to the proposal in order to satisfy these stated Congressional goals. The Commission appears to have correctly intended that its proposed rules should only apply where the parties have otherwise failed to address the disposition of home run wiring contractually. The Commenters request that the Commission clarify that this was its intent. Likewise, the Commission should clarify that the rules apply only where the incumbent's legal or contractual rights to serve the building are completely exhausted, and that MDU owners cannot unilaterally terminate the right of a multichannel video programming distributor ("MVPD") to serve the building in violation of existing contracts. Additionally, the Commission should reiterate that any home run wiring rules do not apply in right of access states, since cable operators in such states have a perpetual right to serve and install their facilities. Such prerequisites will help keep the focus on Congress' stated preference for competition over regulation.

Similarly, if the Commission adopts final rules along the lines of those proposed in the Further Notice which are triggered only upon the termination or expiration of an incumbent video service provider's right to serve a particular building, certain refinements are necessary to ensure that fair competition and consumer choice are promoted over the interests of individual MVPDs and MDU owners.

## **II. THE COMMISSION MUST CLEARLY ESTABLISH THE FUNDAMENTAL PREREQUISITES TO THE APPLICABILITY OF THE PROPOSED RULES**

The Commission's proposed rules would have a significant impact on the property rights of incumbent video service providers, MDU owners, and MDU residents. It is

important, therefore, that the Commission clarify the situations in which the proposed rules, or any rules similar to them which may be adopted, will apply. The Commenters believe the Further Notice does not address with adequate precision the fundamental prerequisites to the applicability of the proposed rules on home run wiring. Overt statement of the situations which will trigger the proposed rules may avoid future confusion.

**A. The Proposed Rules Should Only Apply Where The Parties Have Otherwise Failed To Address The Disposition Of Home Run Wiring Contractually.**

The Commission's goal in this proceeding, as stated in the Further Notice, is to provide "certainty" regarding use of home run wiring upon termination of service.<sup>8</sup>

According to the Commission, disagreement over ownership and control of home run wires "substantially tempers competition."<sup>9</sup> Commenters believe that the best way to achieve the goal of certainty is for incumbent video service providers and MDU owners to set forth in contracts their wishes for disposition of home run wiring upon termination of service.

It would be difficult, if not impossible, to attain greater certainty as to the disposition of home run wires upon termination of service than through express contractual provisions, which have been considered and agreed upon by the parties involved in advance of service, providing for such disposition. The Commission should strive to foster contractual relationships of this nature as the pinnacle of certainty. A "private contract" rule, whereby all contracts entered into after the effective date of Commission rules on home run wiring must contain provisions relating to the disposition of home runs upon termination of service,

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<sup>8</sup>Further Notice at ¶ 4.

<sup>9</sup>Id. at ¶ 31.

would be a far less intrusive way of achieving certainty than the elaborate procedural mechanisms proposed in the Further Notice. The Commission could even suggest or require that certain issues be addressed by such contractual provisions on a going forward basis to alleviate the Commission's concern that some extant written contracts are unclear.<sup>10</sup> For example, the Commission could suggest that contractual arrangements address issues such as ownership of the wiring, obligation to upgrade and maintain the wiring, liability for theft or damage, duty or right to remove, and the authority to retain the wiring in place for potential future use.

Additionally as indicated below, the vast majority of states, such as Arizona, do not have mandatory access statutes. In such states, MVPDs have little or no protection regarding access to buildings, and instead serve MDUs at the whim of landlords. The only protection for MVPDs lies in the contract with the MDU owners. If the Commission attempts to preempt such contracts, MVPDs in Arizona and other states without right of access statutes would be left with virtually no rights at all.

Adopting a private contract rule would also be in keeping with the 1996 Act's call for less regulation, not more. As part of its deregulatory mission, the FCC should prefer private contract solutions over government regulation.<sup>11</sup> Although private contracts may occasionally result in litigation, they require substantially less government intrusion and

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<sup>10</sup>Id.

<sup>11</sup>Congress has repeatedly instructed the Commission to avoid unnecessary government regulation. See, e.g., Communications Act, § 601(6) (the purpose of Title VI of the Act includes minimizing "unnecessary regulation"); 1992 Cable Act, § 2(b)(2) (the policy should be to "rely on the marketplace, to the maximum extent feasible"); Conference Report at 113 (the purpose of the 1996 Act is to provide a "de-regulatory" framework).

oversight than regulations such as those proposed in this proceeding, and they more accurately reflect the will of the contracting parties. A requirement that all future contracts expressly address disposition of the home runs upon expiration of the contract would ultimately phase out altogether the need for FCC regulatory involvement. The Commission should do everything it can to encourage parties to contract for home run wiring disposition.

Even if the Commission chooses not to proactively encourage or require contractual arrangement regarding the disposition of home run wiring, it must make abundantly clear that its proposed rules will not apply where parties have entered into such contracts. The Commission notes in the Further Notice that its proposed rules are similar to a proposal first made by the Independent Cable & Telecommunications Association ("ICTA").<sup>12</sup> Even ICTA recognizes a cable operator's right to "protect itself by obtaining a property owner's agreement guaranteeing the operator access to the property."<sup>13</sup> The proposed rules must not preempt or otherwise interfere with any privately negotiated arrangements regarding disposition of home runs.

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<sup>12</sup>Further Notice at ¶ 2.

<sup>13</sup>Id. at ¶ 22 (citing ICTA Reply Comments at 7). Cites herein to various "Comments" and "Reply Comments," unless otherwise noted, refer to the Comments and Reply Comments filed in response to the Commission's Notice of Proposed Rulemaking in CS Docket No. 95-184, 11 FCC Rcd 2747 (1996).

**B. The Proposed Rules Can Only Apply Where The Incumbent MVPD Has No Continuing Contractual Or Legal Right To Provide Service To Residents Of The MDU Or To Retain Its Facilities Within The MDU.**

In the Further Notice, the Commission states that its proposed rules are not intended to "create or destroy any property rights."<sup>14</sup> The Commenters interpret this to mean that the Commission will not interfere with contractual arrangements regarding the ability of MVPDs to offer service in MDUs or disposition of facilities upon expiration of the contracts, and also that the Commission will not interfere with state or local access statutes or ordinances, or other local law. Indeed, this interpretation would seem to be borne out by the Further Notice, which states:

We propose that the procedural mechanism described below would apply only where the incumbent provider no longer has an enforceable legal right to remain on the premises against the will of the MDU owner. In other words, these procedures would not apply where the incumbent provider has a contractual, statutory, or common law right to maintain its home run wiring on the property. . . . We are not proposing to preempt an incumbent's ability to rely upon any rights it may have under state law.<sup>15</sup>

It is apparent, therefore, that the proposed rules would only apply in specific situations where an incumbent provider's rights are fully exhausted. However, the Commission must be even more explicit by affirmatively providing that its proposed rules would not allow an MDU owner to unilaterally terminate an MVPD's right to serve, and would not apply in a state or community with a right of access law or ordinance.

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<sup>14</sup>Further Notice at ¶ 32.

<sup>15</sup>Id. at ¶ 34 (footnote omitted).



**1. The proposed rules should not allow an MDU owner to unilaterally terminate an MVPD's right to provide service.**

The Commission must clarify that the proposed rules may never be invoked during the term of an existing service contract. Unless the Commission makes clear that expiration and non-renewal of an incumbent provider's contract to serve an MDU is a prerequisite to applicability of the proposed rules, MDU owners may attempt to terminate valid contracts in order to invoke the rules. Such action by MDU owners must not be countenanced, but instead, must be explicitly forbidden.

In the Further Notice, the Commission describes in detail the ICTA proposal,<sup>16</sup> which the Commission has acknowledged is similar to the rules proposed herein.<sup>17</sup> The Commission's description of the ICTA proposal includes the timing and procedures for notice of conversion by an MDU owner to an incumbent provider.<sup>18</sup> Absent from the ICTA proposal, as described by the Commission, is any express caveat that an MDU owner may only give notice of conversion to an incumbent provider if it is not legally bound under contract with that provider. To eliminate any potential uncertainty, the Commission must clarify that MDU owners may not unilaterally decide to convert service to a new provider in violation of the incumbent's legal rights.<sup>19</sup>

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<sup>16</sup>Id. at ¶¶ 15-17.

<sup>17</sup>Id. at ¶ 2.

<sup>18</sup>Id. at ¶ 15.

<sup>19</sup>Sometimes cable operators have difficulty enforcing their legal rights even where contracts with MDU owners exist. See, e.g., American Cablecom L.P. v. Oxford Associates, 758 F.Supp. 1052 (E.D. Pa. 1991) (court denies incumbent cable operator's

(continued...)

The same uncertainty is implicated elsewhere in the Further Notice. Paragraph 35 of the Further Notice seems to suggest that the proposed rules unilaterally allow an MDU owner to give an incumbent provider notice that its access to the entire building will be terminated, even if the incumbent has a valid contractual or other legal right to continue to offer service to the residents of the building. This notion is reinforced by footnote 97, which states that "[a]n MDU owner may, of course, choose to terminate the incumbent provider's access rights pursuant to the terms of a contractual agreement between the parties rather than pursuant to the procedures we propose herein."<sup>20</sup> If the Commission truly intends not to illegally "create or destroy any property rights,"<sup>21</sup> it must make clear that the proposed rules do not give MDU owners a new right to terminate service outside of a contract or state law. Otherwise, MDU owners may attempt creative arguments based upon the Commission's failure to affirmatively state this caveat.

**2. The proposed rules cannot apply in states with right of access statutes, since cable operators in those states have a perpetual right to serve and install facilities.**

The Commission must clarify that the proposed rules do not apply in states where mandatory access statutes preserve franchised cable operators' right to access MDUs. Access statutes exist largely because of franchised cable operators' universal service

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<sup>19</sup>(...continued)  
request for a temporary restraining order and preliminary injunction against having its service terminated and replaced in an apartment complex, despite a contract providing for several more years of service to the complex). The proposed rules must not in any way be seen as condoning breaches of contract.

<sup>20</sup>Further Notice at ¶ 35 n.97.

<sup>21</sup>Id. at ¶ 32.

obligations. Such statutes typically grant franchised cable operators the right, and often the obligation, to serve MDU residents, and prohibit MDU owners from preventing operator access to their buildings. The intent of such statutes is that the MDU owner should not have control over home run wiring. Accordingly, the Commission must clearly state that where access is mandated by law, MDU owners may not ignore such statutes on the basis of the Commission's proposed rules in this proceeding.

The Further Notice appears to discount the legal rights confirmed by access statutes, and therefore must be clarified. In the Commission's proposal for unit-by-unit disposition of home run wiring, the Commission incorrectly asserts that

if a state mandatory access statute only gives a provider access rights to an MDU if a resident requests service, once the resident no longer requests that provider's service, the provider's right to maintain a home run wiring dedicated to that subscriber would be extinguished.<sup>22</sup>

The procedures governing the disposition of home run wiring cannot apply in states with mandatory access statutes (or where other local law provides a right of access).

Mandatory access statutes in most states are not triggered by a tenant's request for cable service and, therefore, would not fall within the ambit of footnote 100.<sup>23</sup> Most mandatory access statutes simply direct that owners of MDUs not interfere with the installation of cable television facilities upon their property, or that residents of MDUs not be

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<sup>22</sup>Further Notice at n.100.

<sup>23</sup>See D.C. Code Ann. § 43-1844.1; Fla. Stat. § 718.1232; Kan. Stat. Ann. § 58-2553; Me. Rev. Stat. Ann. tit. 14, § 6041; Minn. Stat. § 238.23; N.J. Stat. Ann. § 48:5A-49; N.Y. Pub. Ser. Law § 228 (formerly, N.Y. Exec. Law § 828); R.I. Gen. Laws § 39-19-10; Wis. Stat. § 66.085.

denied access to any available franchised or licensed cable television service.<sup>24</sup> Such statutes uniformly allow cable operators to install and maintain broadband facilities in MDU buildings.

For those few states whose mandatory access statutes are triggered by a tenant's request for cable service,<sup>25</sup> such statutory language was intended merely to ensure that tenants are not required to receive cable television service, but rather have the option of receiving such service. Mandatory access provisions that are triggered by a tenant's request for service do not give MDU owners any additional legal rights, and mean only that at least one tenant of a MDU must initially request service in order for a cable operator to be permitted to install its wiring throughout the MDU building, and then offer its service to all MDU residents.<sup>26</sup>

In states where mandatory access is triggered by tenant request as well as those access states where it is not, franchised cable operators have the right to maintain their cable wiring throughout MDUs indefinitely.<sup>27</sup> The Commission's belief that once an MDU resident

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<sup>24</sup>See, e.g., the New Jersey access statute, N.J. Stat. Ann. § 48:5A-49, which states, "[n]o owner of any dwelling or his agent shall forbid or prevent any tenant of such dwelling from receiving cable television service . . . ."

<sup>25</sup>See Conn. Gen. Stat. § 16-333a; 65 Ill. Comp. Stat. 5/11-52-11.1; Mass. Ann. Laws ch. 166A, § 22; 68 P.S. § 250.503-B (Pennsylvania).

<sup>26</sup>See 68 P.S. § 250.503-B; Conn. Gen. Stat. § 16-333a(b); Mass. Ann. Laws ch. 166A, § 22; see also 65 Ill. Comp. Stat. 5/11-52-11.1(a)(ii) (request for cable service must be made by more than three tenants of the MDU in order for cable operator to be permitted to install cable facilities throughout the building in order to provide cable service to the tenants of other residential units as well).

<sup>27</sup>See, e.g., 68 P.S. § 250.503-B; Petition of Manhattan Cable Television, Inc. Order of Entry, Docket No. 80296, at 2 (NYSCCT, rel. Jan. 14, 1993).

terminates cable service, the cable operator's right to maintain its home run wiring dedicated to that subscriber's dwelling unit would be extinguished, is not supported by existing law.<sup>28</sup> Under Pennsylvania's mandatory access law, for example, tenants have the right to request and receive cable television service, and landlords may not prohibit or otherwise prevent tenants from requesting or acquiring cable television service from an operator of the tenant's choice provided that there has been an agreement between the landlord and an operator through a negotiation process outlined in a subsequent provision.<sup>29</sup>

The Pennsylvania statute also grants to operators whose service has been requested an ongoing right of access to the building "for the purpose of constructing, reconstructing, installing, servicing or repairing CATV system facilities," and provides that the "operator shall retain ownership of all wiring and equipment used in any installation or upgrade of a CATV system in multiple dwelling premises."<sup>30</sup> Significantly, ownership of all cable television wiring and equipment is retained even though the statute prohibits an operator from providing "CATV service to an individual dwelling unit unless permission has been given by or received from the tenant occupying the unit."<sup>31</sup> The fact that Pennsylvania's statute allows tenants to receive cable television service from an "operator of the tenant's choice" shows that multiple wires are allowed in an MDU under Pennsylvania law, thereby promoting subscriber choice among concurrently available MVPD services.

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<sup>28</sup>See id.

<sup>29</sup>68 P.S. § 250.503-B.

<sup>30</sup>Id.

<sup>31</sup>Id.

The Commission states in the Further Notice that "an incumbent's ability to rely upon any rights it may have under state law" shall not be preempted by the proposed home wiring regulations.<sup>32</sup> Footnote 100 must be repudiated so that the Commission's home wiring rules do not preempt, or conflict with, existing state law regarding the ownership of home run wiring in states with cable access statutes. The Commission should pronounce that the proposed rules would not apply in access states under any circumstances.

**C. Any Deadlines Set Forth In The Proposed Rules Should Be Tolled By The Commencement Of A Legal Proceeding To Enforce An Incumbent Provider's Legal Rights.**

The Further Notice proposes rules for building-by-building and unit-by-unit disposition of home run wires, establishing deadlines under which incumbent MVPDs who no longer have contractual or legal rights to maintain home runs in an MDU must, upon receipt of notice from an MDU owner, elect to sell, remove or abandon the home runs.<sup>33</sup> The rules also propose deadlines under which the parties could agree on a price if the MVPD elects to sell the home runs.<sup>34</sup> The Commenters believe the Commission should clarify that

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<sup>32</sup>Further Notice at ¶ 34.

<sup>33</sup>In building-by-building disposition, upon receipt of 90 days' notice from the MDU owner terminating service, the MVPD must elect within 30 days to sell, remove or abandon the home runs. Further Notice at ¶ 35. In unit-by-unit disposition, an MDU owner must provide 60 days' notice to the incumbent of its election to allow unit-by-unit competition, and the incumbent would then have 30 days to elect whether to sell, remove, or abandon the home run wires. Id. at ¶ 39.

<sup>34</sup>Under the proposed rules, for both building-by-building and unit-by-unit disposition, if the incumbent elects to sell, the parties would have 30 days to agree on a price. Absent an agreement, the incumbent would then have to choose to either remove or abandon the wires. Id. at ¶¶ 38, 40.

such deadlines do not start running until a final determination of the incumbent provider's legal rights has been made.

The Commission stated in the Further Notice that its proposed rules "would apply only where the incumbent provider no longer has an enforceable legal right to remain on the premises against the will of the MDU owner."<sup>35</sup> As explained above, the Commission should clarify that the proposed rules do not apply where an MVPD has a continuing contractual right to offer service to MDU residents or to retain dormant facilities on MDU premises even after expiration of a service contract. The Commission should also clarify that the proposed rules do not apply where an MVPD has a legal right, such as in an access state, to offer service or construct facilities in MDUs. As a corollary, Commenters believe that the proposed rules should not apply, and any of the periods for election of sale, removal or abandonment should be tolled, where a cable operator timely commences a legal action to enforce its contractual or other legal rights with regard to home run disposition.

The Commission seeks "comment on whether the Commission can and should create any presumptions or other mechanisms regarding the relative rights of the parties if the incumbent's right to maintain its home run wiring on the premises is disputed."<sup>36</sup> The Commission seeks comment, for example, on a presumption that an incumbent does not possess an enforceable legal right to maintain its home wiring on the premises unless the incumbent can "adduce a clear contractual or statutory right to remain."<sup>37</sup> The Commission

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<sup>35</sup>Id. at ¶ 34.

<sup>36</sup>Id.

<sup>37</sup>Id.

should not adopt any such presumptions, and indeed it cannot. Any such presumption would contravene the Commission's commitment not to "create or destroy any property rights,"<sup>38</sup> or to "preempt an incumbent's ability to rely upon any rights it may have under state law."<sup>39</sup> Moreover, any such presumption would result in an unconstitutional taking of personal property under the Fifth Amendment.<sup>40</sup>

If the contractual and statutory rights of incumbent providers to remain on a MDU premises are in dispute, the deadlines proposed by the Commission should be tolled until the dispute has been resolved. An incumbent provider must be allowed to remain on the premises and continue to serve MDU residents pending a legal resolution of such dispute. Otherwise, an incumbent could be evicted prior to legal resolution, disrupting service to residents and permanently jeopardizing the incumbent's ability to remain in business in that building. This result clearly would not be in the public interest.

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<sup>38</sup>Id. at ¶ 32.

<sup>39</sup>Id. at ¶ 34. For example, under Virginia law, just because an MDU owner signed an exclusive contract with a new cable operator, did not mean that the incumbent cable operator lost its rights to its home run wires. See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp. et al., 65 F.3d 1113 (4th Cir. 1995), in which the United States Court of Appeals for the Fourth Circuit upheld a lower court ruling that home runs did not become fixtures but remained the personal property of the incumbent.

<sup>40</sup>U.S. Const. amend. V. The proposed rules raise takings problems if they are interpreted as creating any presumption of abandonment of home run wiring if cable operators do not remove or sell such wiring within a specified time period. Such a presumption would take valuable property rights away from cable operators. For example, cable operators would no longer be able to access or exclude others from using that part of the wiring deemed abandoned. Taking away the right to exclude others constitutes a per se taking of property. See, e.g., Nixon v. United States, 978 F.2d 1269, 1285-86 (D.C. Cir. 1992); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Hodel v. Irving, 481 U.S. 704, 716 (1987).



**III. ADOPTION OF ANY RULES ALONG THE LINES OF THE PROPOSED RULES CONTAINED IN THE FURTHER NOTICE REQUIRES CERTAIN REFINEMENTS**

Any MDU inside wiring rules adopted in this docket applicable to the disposition of home run wiring, especially if along the lines of those proposed in the Further Notice, require certain refinements in order to further the goals of increased consumer choice and promotion of video service competition while protecting valid property interests.

**A. The Proposed Procedures Should Not Apply To Building-By-Building Switch-Overs.**

Under the Commission's proposal, in the building-by-building scenario, the existing MVPD would be required, at the request of the MDU owner, to either remove, sell or abandon its wiring within the building as the new exclusive MVPD selected by the MDU owner takes over providing service to the building.<sup>41</sup> The Commenters believe that any rules adopted by the Commission herein should not apply to building-by-building transitions. To do so would destroy, not enhance, consumer choice, which, as explained above, is the stated goal of Congress. If a building owner decides unilaterally to switch all of the MDUs from one MVPD to another, whether based on a majority vote of tenants or without any tenant input, individual residents will have had their ability to choose among MVPDs hijacked. As the Commission acknowledges, absent unit-by-unit competition, "MDU residents often have no choice at all."<sup>42</sup> Instead, in order to further the goals it cites, the Commission should create incentives for MDU owners to allow competition among MVPDs

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<sup>41</sup>Further Notice at ¶ 35.

<sup>42</sup>Id. at ¶ 46.